IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 137 of 1995

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COMMISSIONER OF INCOME TAX

Versus

MANI ENTERPRISES

Appearance:

1. INCOME TAX REFERENCE No. 137 of 1995

MR MANISH R BHATT for Petitioner No. 1

NOTICE UNSERVED for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

Date of decision: 22/01/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

In this reference at the instance of the revenue, the following question is referred for our opinion in respect of assessment year 1984-85 :-

"Whether the Appellate Tribunal is right in law and on facts in holding that provisions of Section 167A were not applicable in the present case and further directing that the assessee should be taxed at appropriate rate considering it as having determinate shares ?"

2. We have heard Mr MR Bhatt, learned standing counsel for the revenue. Though the notice is unserved on the respondent-assessee, we are inclined to proceed with the hearing of this reference in view of the fact that the question referred for our opinion is required to be answered in favour of the assessee and against the revenue.

3. The assessee is an Association of Persons. The assessee was sought to be charged tax at the maximum marginal rate under Section 167A of the Income-tax Act, 1961 ("the Act" for short). The contention of the assessee was that the shares of the beneficiaries and/or the members were determinate and known and, therefore, the provisions of Section 167A of the Act were not applicable. The Assessing Officer took the view that there are 13 members as beneficiaries of the trust and that the trust deed provided for admission of further members and the trust deed also provided for determination of shares of incoming members and about the conditions and procedure regarding admission of new members. The Income-tax Officer, therefore, came to the conclusion that reading the trust deed as a whole, the number of members and their respective shares were not determinate and were not known and, therefore, applied the provisions of Section 167A and charged tax at the maximum marginal rate.

4. In appeal, the assessee succeeded as the Deputy Commissioner of Income-tax (Appeals) held that the provisions of Section 167A of the Act were not applicable. The revenue's appeal came to be dismissed by the Tribunal.

Hence, this reference at the instance of the revenue.

5. Mr MR Bhatt, learned standing counsel for the revenue has submitted that since the trust deed provided for admitting new members, the shares of the existing members were liable to change and, therefore, the shares were indeterminate and accordingly the provisions of Section 167A were attracted.

6. On going through the judgment of the Tribunal, we find that the Tribunal has given the findings of fact that in the constitution deed, the beneficiaries have been named; they are all individuals; their shares are specific and that the assessee is an Association of Persons, the shares of whose members are determinate. It was on this basis that the Tribunal held that the provisions of Section 167A of the Act were not applicable. The Tribunal has further held that it was an admitted fact that no new member was admitted after the Association of Persons was formed on 10.4.1981 and was dissolved on 22.2.1985 and that throughout the existence of the AOP, the same members, whose names were mentioned in the constitution, continued. Consequently, the specific and determinate shares of the members did not undergo any change.

7. In view of the aforesaid findings of fact given by the Tribunal which have not been challenged, in our view, the Tribunal rightly held that the clauses contained in the trust deed enabling the trustees to enroll more members did not convert the specific determinate shares of the existing members into indeterminate shares. Clauses 5 and 6 relied by the revenue read as under :-

> "Clause 5 lays down that any person shall be eligible to become a member of the association and clause 6 lays down that the members of the association can be acquired by an application for membership or by transfer of members or by any other mode that may be decided by the association from time to time."

8. As already indicated earlier, mere possibility of admission of new members to the association in future did not change the determinate shares of the existing members. Section 167A of the Act, as was in force at the relevant time (which was inserted by the Finance Act, 1981 w.e.f. 1.4.1981 till substituted by the Finance Act, 1985 w.e.f. 1.4.1985), read as under :-

> Charge of tax where shares of members unknown.
>
> 167A.(1) Where the individual shares of the members of an association of persons (other than a company or co-operative society) in the income of such association are indeterminate or unknown, tax shall be charged on the total income of the association at the maximum marginal rate.

(2) Where the individual shares of the members of an association of persons (other than a company or co-operative society) in any part of the income of such association are indeterminate or unknown, the income-tax payable by the association shall be the aggregate of -

(i) the amount of income-tax calculated on the aforesaid part of the total income, at the maximum marginal rate; and

(ii) the amount of income-tax with which it would have been chargeable had the remaining part of the total income been its total income.

Explanation : For the purposes of this section,-

(a) "maximum marginal rate" shall have the meaning assigned to it in Explanation 2 below sub-section (3) of Section 164;

(b) the individual shares of the members of an association of persons in the income of such associations hall be deemed to be indeterminate or unknown if such shares are indeterminate or unknown on the date of formation of such association or at any time thereafter."

For the applicability of the above provisions, it was necessary that the individual shares of the members of the association were indeterminate or unknown on the date of formation of such association or at any time thereafter. Admittedly, on the date of formation of the association, the shares were determinate or known. Hence, the first part would not apply. As far as the second part is concerned, "or at any time thereafter" has already been negatived in view of the finding of fact given by the Tribunal that without any addition of new members the individuals who were members on the date of formation of the association of persons continued till the AOP continued to exist. It is necessary to note that clause (b) of Section 167A did not provide that the shares are indeterminate or unknown on the date of formation of such association or "are capable of changing at any time after the date of formation".

In view of the plain language of the provisions of Section 167A of the Act and in view of the specific

shares of the individuals who were members of the association during the relevant period as indicated above, in our view, the Tribunal rightly held that the provisions of Section 167A of the Act were not applicable in the facts of the case.

9. We accordingly answer the question in the affirmative i.e. in favour of the assessee and against the revenue.

The reference accordingly stands disposed of.

(M.S. Shah, J.)

(A.M. Kapadia, J.)

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